No. 20770

In the

United States Court of Appeals

for the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation; MANTREL, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation; BORG WARNER CORPORATION, an Illinois corporation; CALIFORNIA ELECTRIC SUPPLY COMPANY, a California corporation; RADIO CORPORATION OF AMERICA a Delaware corporation; WHIRLPOOL CORPORATION, a Delaware corporation; MAYTAG COMPANY, a Delaware corporation; MAYTAG WEST COAST COMPANY, a California corporation, GENERAL MOTORS CORPORATION, a Delaware corporation; FRIGIDAIRE SALES CORPORATION, a Delaware corporation, NORGE SALES CORPORATION, an Indiana corporation,

Appellees,

and

BROADWAY-HALE STORES, INC., a California corporation,

Defendant.

On Appeal from the United States District Court for the Northern District of California

Brief for Appellee California Electric Supply Company

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JURISDICTIONAL STATEMENT

Plaintiffs UNITED SHOPPERS EXCLUSIVE (hereinafter referred to as U.S.E.) and MANFREE, INC. (hereinafter referred to as Manfree) brought two private anti-trust actions: Case No. 39336 covered the period March, 1957 to

August, 1960; Case No. 42674 covered the period August, 1960 to August, 1964.

Plaintiffs sought treble damages and injunctive relief and invoked the jurisdiction of the United States District Court pursuant to the provisions of 15 U.S.C., Sections 15 and 16 because of alleged violations by defendants of Sections 1 and 2 of the Sherman Act.

The two cases were consolidated for trial and the basic issues of liability were set forth in the pretrial order as follows:

> "a. Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?
>
> "b. Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?"

The pretrial order specified that the issue of liability be tried first and that the issue of damages be tried thereafter before the same jury. (R. 1608-1609)

Trial commenced on September 1, 1965. At the conclusion of plaintiffs' case on the issue of liability all the defendants moved for directed verdicts and for dismissal of the complaints. On November 24, 1965, the Court granted the motions of all defendants, including appellee California Electric Supply Company (hereinafter referred to as California Electric), and judgment was entered accordingly. (R. 1912-1977)

Appellants filed their notice of appeal on December 1, 1966. (R.2048) This Court has jurisdiction over the appeal pursuant to 28 U.S.C., Section 1291.

Upon appellants' motion and subsequent to the docketing of this appeal, this Court dismissed Broadway-Hale Stores, Inc. (hereinafter referred to as Broadway-Hale) as an appellee.

There are nine appellees: California Electric, until 1963 distributed Philco appliances and television sets; Frigidaire Sales Corporation, distributed Frigidaire appliances manufactured by General Motors; Norge Sales (dismissed on summary judgment) distributed Norge appliances through local distributors; General Electric manufactured appliances and television sets; RCA manufactured television sets only; Maytag, Whirpool and Borg-Warner and General Motors manufactured appliances; Broadway-Hale was a retailer. Various other manufacturers and distributors and retailers were defendants but were dismissed prior to trial.

STATEMENT OF THE CASE

1. California Electric Did Not Conspire with Anyone to Boycott the Plaintiffs.

(A) THE APPELLEES.

From November 1, 1956 to January 15, 1963, when its distributorship was cancelled by Philco Corporation, California Electric was an independent distributor of major appliances (herein sometimes called Philco white goods) and television sets to the retail trade. It was at no time an agent of Philco Corporation. Other distributor defendants are Frigidaire Sales Corporation and Maytag West Coast Company. The manufacturer defendants are Radio Corporation of America, Whirlpool Corporation, General Elec-

tric, General Motors Corporation, and Borg-Warner Corporation. There was no evidence of any dealings between California Electric and any of the distributor or manufacturer appellees.

The sole retailer defendant at the time of trial was Broadway-Hale. There was no evidence in the record of any dealings between California Electric and Broadway-Hale other than in the ordinary course of sales and isolated instances of liaison between Philco Corporation and Broadway-Hale over a discrepancy in the Broadway-Hale associate distributor cooperative advertising account, hereinafter described more fully.

(B) THE CO-CONSPIRATORS.

In addition to the defendants remaining at the time of trial, there were numerous defendants who were dismissed prior to the time of trial but remained in the limbo category of "co-conspirators". These included manufacturers, distributors, retailers and newspapers. There was no evidence of any dealings between California Electric and the alleged co-conspirators, other than dealings with Philco Corporation and with retailers and newspapers in the normal course of business activities.

(C) APPELLANTS.

U.S.E. was a lessor, not a retail seller. Its concessionaire for the sale of white goods and television sets, during the period concerned in this action, was Manfree.

California Electric never discussed plaintiffs with Philco Corporation during the period 1957-1963. (T. 3867) The subject of selling to the plaintiffs never was discussed by California Electric with *any* dealer, distributor, manufac-

turer or manufacturer's representative. (T. 3865) Nobody requested California Electric to forebear selling to plaintiffs. (T. 3865) Furthermore, California Electric not only had no policy of refusing to sell to discount houses, but, to the contrary, it in fact sold to plaintiff Manfree, a self-styled discount house. (T. 3688, 3756, 3934, 3935, 5713)

2. California Electric Did Not Conspire with Anyone to Boycott Appellants for the Purpose of Maintaining Retail Prices.

(A) PRICING AND ADVERTISING PRACTICES.

Under the Philco distribution system, during the period concerned in this action, there were two systems: one was a chain from manufacturer to distributor to retailer; the other was direct from manufacturer to associate distributor. (T. 3603-3609)

In San Francisco, the Philco distributor was California Electric and the Philco associate distributors were Broadway-Hale and Young Brothers, both of which were retailers. (T. 3825, 3864) Price sheets prepared by Philco Corporation contained a distributor price, a suggested retail price, and also an associate distributor price. (T. 3603-3609)

California Electric's price sheets contained several wholesale prices which were determined by the size of the initial order of a given retailer; they contained also suggested retail prices. Price sheets prepared by California Electric did not contain prices for associate distributors, such as Broadway-Hale and Young Brothers, since the latter dealt directly with Philco. (T. 3677-3684)

The advertising program set up by Philco Corporation for the benefit of retailers included co-operative advertising funds contributed one-half by Philco and the distributor and one-half by the retailer, where Philco sold to a distributor. It included co-operative advertising funds contributed one-half by Philco and one-half by the associate distributor. (T. 3603-3609) It included also a "key dealer" advertising

program, in which the advertising copy was prepared and the media were selected by Philco, and in which advertising funds were contributed entirely by Philco. (T. 3754)

It was the policy of California Electric to accept requests for co-operative advertising funds from retailers where the retailer agreed to advertise Philco products either at suggested list price, or at a lower price "with trade" or at no price. (T. 3814, 3859, 3565)

Some retail dealers to whom California Electric sold Philco products chose not to receive co-operative advertising funds, but to receive an advertising allowance in another form. One of these retail dealers was plaintiff Manfree. (T. 3971-3972)

During the period March, 1957 to September, 1958, plaintiff Manfree ordered an average of one or two units at a time with an average interval of two weeks between orders. Under these circumstances, plaintiff Manfree chose to receive its advertising allowance in the form of a two per cent discount off the invoice price. (T. 3972) On one occasion plaintiff Manfree requested co-operative advertising funds, and they were granted. (T. 3949-3951)

(B) DEALINGS BETWEEN CALIFORNIA ELECTRIC AND BROADWAY-HALE.

Broadway-Hale received no special treatment from California Electric. Broadway-Hale at no time demanded that this appellee refrain from selling to discount houses. (T. 3748-3749)

California Electric became involved in the associate distributor co-operative advertising account of Broadway-Hale with Philco Corporation on two occasions. The first instance occurred when Philco Corporation in 1957 erroneously credited $10,000 to the account of California Electric which should have been credited to Broadway-Hale as part of the associate distributor advertising fund. Califor-

nia Electric then credited that amount to Broadway-Hale. (T. 3736)

The second instance concerned a 1956 overexpenditure by Broadway-Hale of some $20,000 to $40,000, incurred prior to the time California Electric became a Philco distributor. The overexpenditure occurred because of inadequate accounting procedures in use in 1956. This resulted in the discovery of a deficit in the co-operative advertising account of Broadway-Hale of $20,000-$40,000 in the period 1957-1958. (T. 3704) Philco and California Electric had a meeting in 1960 concerning the Broadway-Hale overexpenditure. California Electric agreed at that time to monitor the records of the expenditure of co-operative advertising funds by Hale until the deficit was ended. (T. 3725-3726)

In neither instance was California Electric required to nor did it volunteer funds for the benefit of Broadway-Hale.

3. The Sales Relationship Between California Electric and Manfree.

The record shows, that all decisions of California Electric with respect to sales to Manfree were arrived at independently and unilaterally.

Appellants rely on the testimony of their Mr. Freeman, who could do no better than hint darkly, through double hearsay testimony, of conversations with California Electric salesman, Mr. Muntain regarding "anticipated pressure", "pressure" and, finally, "repercussions" from unnamed retail dealers if California Electric did not drop Manfree as a retail dealer of Philco products.*

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*While the trial court admitted into evidence the double hearsay testimony of Mr. Freeman, it did so with grave doubts as to admissibility under the *Flintkote* case and even graver doubts as to

To facilitate discussion of Mr. Freeman's hearsay testimony, we have divided it into five acts:

(1) Commencement of sales relations (Spring, 1957);
(2) Immediately prior to appellants' first anniversary mailer (January and February, 1958);
(3) Immediately after appellants' first anniversary mailer (Spring, 1958);
(4) Cessation of sales relations (October, 1958);
(5) Meeting after Manfree form letter requesting purchase of Philco products (June, 1960).

A review of Mr. Freeman's testimony shows the following:

(1) Commencement of sales relations (Spring, 1957).

U.S.E. opened for business in March, 1957. Manfree began the sale of television sets and major household appliances in May, 1957. California Electric commenced selling major household appliances to Manfree in May, 1957, through Mr. Muntain, its salesman for the San Francisco area. (T. 3688, 3934-3935, 5713)

Mr. Freeman testified that the first conversation took place between May and June, 1957:

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its weight. In its Memorandum Opinion and Order Granting Motions for Directed Verdict, the Trial Court stated, at R. 1973-1974:

> "The only aspect of the case against California which can be said to be different from that of the other distributor defendants, and which merits further consideration, arises out of the testimony of Bernard Freeman of Manfree, relating to four conversations he had with Muntain. Because of serious doubt as to the authority of Muntain to speak for California Electric and the hearsay upon hearsay, and the general and conclusionary nature of Mr. Muntain's statements, there is serious question as to the admissibility of these conversations against any defendant in this case. See *Flintkote Company v. Lysford,* 246 F.2d 368, 379-389 (9 Cir. 1957). However, the Court admitted this testimony against California Electric and it will be considered."

"I met Mr. Muntain in the Manfree department in U.S.E. and I asked him about advertising the Philco line in the newspapers. And Mr. Muntain stated that not only could we not advertise it, but we—we could not advertise it. And I asked him, 'Well, suppose we spent our own money and advertised the line?' And Mr. Muntain stated that he wouldn't allow us to run it even if we used our own money in advertising Philco." (T. 5725)

Mr. Freeman admitted:

"Mr. Muntain stated, after I had urged him further about the advertising, that he *anticipated* pressure from his other accounts." (T. 5725) (Emphasis added)

Mr. Muntain, incidentally, testified that he did not recall *any* conversation with Mr. Freeman with respect to advertising of Philco products in the Spring of 1957. (T. 3941)

Mr. Rising, the general manager of the appliance division of California Electric, testified that he did not recall *any* internal discussions at California Electric in any way related to sales to Manfree in the Spring of 1957. (T. 3688)

Mr. Williamson, the general manager of Manfree, was not called as a witness by the appellants.

(2) Just prior to the appellants first anniversary mailer (January and February, 1958).

The second conversation, according to Freeman, occurred in January or February of 1958.

"I told Mr. Muntain that we were issuing advertising for our first anniversary, which would take place in March of 1958, and I requested advertising and Mr. Muntain said that he would not allow us to advertise. I told him that we were going to put out two issues, they were both printed by the San Francisco Call Bulletin. One would be an insert in the newspaper and the second one would be mailed directly to our customer list. And I further told him that if necessary we would

eliminate his ad in the newspaper and have it in the specific mailer. He told me he would let me know. And a short time later, it could have been within a week, he came back and said that *he would allow* us to advertise. And, if I recall correctly, *he would pay for the advertisement.*" (T. 5728) (Emphasis added)

Mr. Muntain did not recall *any* conversation with Mr. Freeman as to this first anniversary mailer. Mr. Williamson did not request co-operative advertising funds on Philco products for the first anniversary edition. (T. 3943)

Mr. Muntain had no recollection of any California Electric policy of limiting pictures of Philco products to mailer ads. (T. 3948)

Mr. Rising, who was questioned at great length by appellants, was not asked any questions by their counsel with respect to this conversation.

Mr. Williamson was not called as a witness by appellants.

(3) Just after the appellants' First Anniversary Mailer (Spring, 1958).

Mr. Freeman said that shortly after the ads appeared:

"I stopped Mr. Muntain, or he stopped me, and I mentioned the fact that his ad was so successful and we were doing very well in the sales of Philco products that I felt that we should set up some program. And Mr. Muntain stated that he had received so many *repercussions from his accounts and other salesmen had received repercussions from their other accounts* that he *might* have to cut us off . . . I told him if he cut us off, we would sue him." (T. 5733) (Emphasis added)

Mr. Muntain testified that he did not recall having any conversation with Mr. Freeman on the subjects mentioned in Mr. Freeman's testimony. He did not recall *any* conversation with Mr. Freeman at any time on the subject matter of Mr. Freeman's testimony. (T. 3952-3958)

Mr. Muntain further testified that, after the first anniversary edition of March, 1958 was published, he had a conversation with Mr. Valenson, the sales manager of California Electric, with respect to the results of the ad—whether the ad sold any merchandise for Manfree and in what quantity. Nothing was said in this conversation about pressure from other accounts. (T. 3957)

Mr. Rising recalled no discussion of repercussions from the appellants' first anniversary mailer, nor did he have any knowledge of a California Electric policy on advertising by discount houses. (T. 3746-3748)

Mr. Valenson and Mr. Williamson were not called as witnesses by the appellants.

(4) Cessation of Sales Relations (Fall, 1958).

The fourth of these conversations occurred in about October, 1958, at which time Mr. Williamson of Manfree was also present:

> "Yes, both Mr. Williamson and myself asked Mr. Muntain why he hadn't answered our phone calls at California Electric on the subject of why we were unable to order any more Philco merchandise, and he said—I don't recall what he said the reason for not coming back was—I remember asking him why he refused to sell, or cut us off, and he said 'because of *pressure* from stores, *from other stores*'." (T. 5736-5737) (Emphasis added)

Mr. Muntain testified that he did not recall *any* conversation with Mr. Freeman in Fall, 1958. (T. 3967-3971)

Mr. Muntain testified that he called upon the plaintiffs in the Fall of 1958, accompanied by Mr. Valenson, for the purpose of soliciting purchases of Philco products. When they asked to see Mr. Freeman they were told to wait in a reception room. They were not invited into Manfree's office

and did not meet Mr. Freeman. Instead, Mr. Williamson, Manfree's general manager, came to the counter in the reception room and advised Messrs. Muntain and Valenson that they were no longer interested in purchasing the Philco line from California Electric as they could buy competitive merchandise at a lower price. (T. 3689-3694, 3967-3971)

On at least two or three occasions after December, 1958, Mr. Muntain called upon Mr. Williamson who gave him no orders for merchandise. (T. 3971)

Mr. Rising testified that in the Fall of 1958 he had a discussion with Mr. Valenson concerning the volume of the Manfree purchases of Philco appliances from California Electric. Mr. Rising was not interested in Manfree as a Philco dealer unless its volume of purchases increased. He requested Mr. Valenson to call upon Manfree for the purpose of soliciting orders for Philco appliances. (T. 3692)

Neither Mr. Valenson nor Mr. Williamson were called as witnesses by appellants.

(5) Meeting after Manfree's form letter requesting carload lots of Philco products (June, 1960).

Mr. Freeman testified that he and Mr. Alpine had a conversation with Mr. Weaver, a California Electric salesman, in June, 1960:

> ". . . Mr. Weaver, a representative of California Electric Supply, called on Mr. Alpine and myself. At this meeting between Mr. Weaver and Mr. Alpine, and myself being present, Mr. Alpine asked whether or not —Pardon me, I would like to correct that statement. Mr. Weaver was asked to sell us Philco in carload lots. At this particular time Mr. Weaver stated they were having difficulty at the Philco factory and could not deliver us merchandise in carload lots. We then asked him if we could buy separate pieces and Mr.

> Weaver replied that he couldn't even sell us individual pieces because he couldn't supply his own dealers.
>
> . . . Mr. Weaver, after all these questions were presented to him, finally stated that he would not sell us, even though the new line was going to be shown later on that year." (T. 5778)

There was no communication between Manfree and California Electric from the early part of 1959, when Mr. Muntain last called on Manfree, to the latter part of June, 1960, when California Electric received the general form letter sent out by Manfree to many manufacturers and distributors in the industry purportedly seeking carload lots of television sets and major household appliances.

Mr. Rising testified that upon receipt of this letter, he advised Mr. Valenson of its contents, whereupon Mr. Valenson sent Mr. Weaver, a key account salesman, to call upon Manfree. (T. 3694-3699, 3915-3917)

If California Electric did not intend to sell Philco television sets and major household appliances to Manfree, it is obvious that Weaver, the key salesman, would never have been sent. Weaver took his order book and a franchise form with him. (T. 3917) Weaver told the Manfree representatives (T. 3919) that at that time there was an existing steel strike and a shortage of Philco merchandise, with the result that immediate delivery could not be made. Weaver told them that the strike would be over soon and he "would be glad to talk to you in regard to it at that time". (T. 3920)

Thus Weaver opened the way for further business relations betweeen California Electric and Manfree, but instead of in any way pursuing the matter further, appellants filed the lawsuit on August 12.

Mr. Muntain testified that four of these "conversations" did not occur. Plaintiffs failed to call any possible witnesses

to these "conversations"—Mr. Valenson or Mr. Williamson. Mr. Freeman's account of the fifth conversation with Mr. Weaver is incredible.*

Manfree, not California Electric, terminated business relations. Manfree, not California Electric, rejected invitations to trade shows. Manfree failed to follow up California Electric's invitation to renew sales relations.

In short, the record shows that not only did California Electric not conspire to boycott appellants, but also it did not refuse to sell Philco products to Manfree.

California Electric was terminated as a Philco distributor in January, 1963. (T. 3666)

DISCUSSION OF APPELLANTS' SPECIFICATIONS OF ERRORS

Specification I—Granting Motion for Directed Verdict and Dismissing the Complaint as to Each Defendant.

There is no discussion of this specification by appellants under this section and, therefore, no answer is made to this point at this stage of this brief.

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*Small wonder that the trial court, after considering Mr. Freeman's testimony, said in its Memorandum Opinion, at (R. 1976):

> "These, as the Court has indicated above, are for the most part self-serving hearsay statements expressing opinions and conclusions and without any real identification of the source of the pressures or identity of the 'other accounts' or 'other stores', and as such lose much of their probative force. Such statements under proper circumstances might well be significant, and since the objections thereto voiced above go to their weight rather than to their admissibility, had there been independent proof of a conspiracy and California Electric's connection therewith, it could be reasonably argued that they were enough to send the case to the jury as to California Electric. *But there was no independent proof of the wide combination and conspiracy here charged,* and absent a showing of some connection or concert of action of California Electric with one or more of the defendants or co-conspirators, these statements, binding only on California Electric, *become mere unilateral reflections of the business practices of California Electric.*" (Emphasis added)

Specification II—Ordering a Separate Trial on Liability.

The Handbook of Recommended Procedures for the Trial of Protracted Cases, adopted by the Judicial Conference of the United States, Section VI, "Plan of Trial," Subsection A, recommends pre-trial decisions as to whether there will be separate trials of some issues, and specifically suggests the possible separation of the issue of liability from the issue of damages in Subsection (3) thereof.

Specification III—Limiting Proof to Evidence of Alleged Horizontal Conspiracy.

This specification of error, common to all appellees, is extensively argued in the briefs of other appellees and will not be repeated here. We incorporate by reference the replies in the briefs of the other appellees.

Specification IV—Summary Judgment in Favor of Norge Sales.

This is a specification solely related to Norge Sales and, therefore, is not commented upon in this brief.

Specification V—Excluding Evidence as to Alleged Violations of the Sherman Act.

This section covers 57 pages, starting at page ii and ending at page lix.

Each of the Subsections A through G is separately devoted to a particular named appellee. Subsection A is the only one that concerns appellee, California Electric and, therefore, is the only segment of this group of subsections that requires comment from us.

Subsection A is divided into certain subsections as follows:

(1) THE EXCLUSION OF FREEMAN'S TESTIMONY OF VALENSON'S STATEMENTS.

In the first of these (V-A-1) appellants complain of the exclusion of testimony of Bernard Freeman, the chief officer of appellants, regarding Mr. Valenson's alleged statements to him. The record not only shows that appellants made no effort to bring Mr. Valenson to the trial, eschewing repeated admonitions by the Court to do so, but also shows that in Valenson's deposition, taken by appellants before trial, not one word was asked about the alleged statements.

Counsel's endeavors are surprising. He stated he wished to lay a foundation (for hearsay testimony by Mr. Freeman of what Mr. Valenson was supposed to have confided to him) by asking Mr. Rising of California Electric whether or not he and Mr. Valenson had an argument about pay. Counsel suggested that this would establish the reason why Mr. Valenson later may have been willing to defect to appellants.

This labyrinthian approach was properly rejected by the court. (T. 3762):

> "The court: All right, the court is prepared to make its ruling. The offer of proof is rejected. It is just that simple. No basis for it, Mr. Keith. *You can call Mr. Valenson and you can put in his deposition.*" (Emphasis added)

On the same page of the transcript, the trial judge says:

> "You had ample opportunity to take his deposition on this subject in full, Mr. Keith. Your present offer is rejected as far as this type of proof goes."

There is a later reference to this situation where counsel for California Electric, at pages 3567-3569 of the transcript, pointed out that Mr. Valenson had been produced at a deposition, yet Mr. Keith failed to question him on any of

the statements ("admissions") that Mr. Freeman says Mr. Valenson made in spite of the availability of a complete range of cross-examination of one called as an adverse witness.

Still later, the court again reminds counsel that he should put Mr. Valenson on the stand. (T. 3577):

> "It may be that your only out is to bring Mr. Valenson here, Mr. Keith:

The Court didn't stop with merely this repeated advice and admonition; it spelled out the reason. (T. 3577):

> "The Court: If this is not an act or declaration of a co-conspirator in furtherance of a conspiracy, then Mr. Freeman cannot testify as to what Mr. Valenson said. The only one that can testify is Mr. Valenson, whatever his name is."

Let us now examine the challenged specific rejections of Mr. Freeman's versions of what Mr. Valenson was alleged to have told him. Appellants divide the Valenson story into three parts, designated (a), (b), (c), each described as "admissions" by Mr. Valenson.

(a) In subsection (a) appellants argue that testimony by Mr. Freeman that Mr. Valenson (ex-employee of California Electric) had stated that appellants had "a million dollar conspiracy case" and that "he couldn't take it anymore" and was "willing to help appellants" constitute "admissions" under the law of evidence. Appellants rely upon pages 3556-3569 and 3574-3579 of the transcript which contain *no testimony whatsoever*. The reference to the record is merely colloquy between Mr. Keith, Mr. Littman, Mr. Dold and the Court.

(b) Similarly, in subsection (b) (page ii) appellants assert that Mr. Valenson told Mr. Freeman that members of California Electric has requested him to give

false testimony in his deposition and that the company was afraid to have him testify. Appellants cite pages 3757-3762 of the transcript in support, but in those pages Mr. Rising (an employee of California Electric) states that after this suit was filed he asked Mr. Valenson if he had done anything that would justify a suit, and Mr. Valenson said he had not (T. 5757). At page 3758, lines 3-8, Mr. Rising states that he never talked to Mr. Valenson about his deposition. The rest of the record references by appellants in this subsection consist again of mere colloquy between the Court, Mr. Keith, Mr. Dold and Mr. Littman with respect to an attempted offer of proof and do not contain any testimony.

The short answer to this asserted error was given by the trial judge (T. 3862) who told appellants to call Valenson as a witness or at least read his deposition. They did neither.

(c) In subsection (c) appellants state that Mr. Valenson admitted that Mr. Muntain, a California Electric salesman had not told the truth, in his deposition, about California Electric's refusal to deal. There is no testimony of Mr. Valenson. The "evidence" appellants would rely on here is that Mr. Freeman (appellants' leader) says Mr. Valenson, an ex-employee, told him that Mr. Muntain, a California Electric employee, had lied in his deposition. No clue is given as to what or how. No mention is made in appellants' brief of the fact that Mr. Muntain was on the stand at the trial but was not asked a word on this subject.

It is parenthetically noteworthy that, on March 25, 1963, at Freeman's deposition, a memorandum prepared by Mr. Freeman of his alleged conversation was introduced into

evidence as Exhibit No. 32 to that deposition. Mr. Freeman's litigation memorandum states that California Electric, after 17 years, had cut Valenson's throat and that he is willing to testify on appellants' behalf. It contained no reference to a Valenson opinion as to any million dollar lawsuit nor to any opinion that John Muntain had lied. When Mr. Freeman was asked why he didn't put these alleged statements of Mr. Valenson in his memorandum to his own counsel, his answer was that it was "probably neglect" on his part.

(a) An Agent's Authority Must Be Proved Before His Statements May Be Considered as an Admission.

Appellants' theory of the admissibility of Mr. Freeman's hearsay report of Mr. Valenson's hearsay statements is that Mr. Valenson was California Electric's agent and the statements were within the scope of his authority and were made in furtherance of the conspiracy.

Appellants made absolutely no effort to establish the fact of agency. As stated in 4 *Wigmore,* Evidence Section 1078 (3d ed. 1940):

> "It may be noted that the *fact of agency* must of course be somehow evidenced *before* the alleged agent's declaration can be reached as admissions . . ." (Emphasis added)

Under conventional conceptions of agency law, an employee may make admissions which will be receivable against his employer *if* he has either express or implied authority to make such statements. (California Civil Code Section 1222(b)).

The question of authority depends upon the rules of the substantive law of agency. *Flintkote Co. v. Lysfjord,* 246

F.2d 368, 384-385 (9th Cir. 1957), cert. denied, 355 U.S. 835 (1957); *Restatement (Second) Agency* §§ 286 and 288.

In *Flintkote Co. v. Lysfjord, supra,* the Court in reversing a judgment in a private anti-trust action said:

> "One of the very best reasons for the hearsay objection is to prevent the presentation of self-serving statements (Footnote omitted.)." (at 382)

Mr. Freeman's proffered testimony is obviously self-serving.

The Court has the

> "duty of seeing that any evidence, ordinarily inadmissible as hearsay, is admitted into evidence for the jury to consider *only* when a proper foundation for its admission has been laid." (at 385)
>
> "There was an utter lack of proof of or any questioning seeking to establish Ragland's authority to speak on behalf of Flintkote, concerning the alleged incriminating statements of Krause, Howard, and Newport, threatening Flintkote with a boycott." (at 385)

It was error, said the Ninth Circuit, to admit the hearsay declarations attributed by plaintiff to Ragland (a promotional salesman) "without any foundation showing the extent and scope of the authority resting in the employee Ragland, if any, to act for and bind the corporate defendant." (At 385) The hearsay declarations attributed to Baymiller (an assistant sales manager) could be admitted "provided that a proper foundation had been laid." (At 386)

In *Northern Oil Co., Inc. v. Socony Mobil Oil Co., Inc.,* 347 F.2d 81, 85 (2d Cir. 1965), the Court in reversing a judgment because of the erroneous admission of hearsay declarations of an alleged agent followed the rule in Section 286 of Restatement (Second) Agency, and held:

> "Thus, the relevant inquiry should have been whether that employee had any general authority to make state-

ments concerning corporate litigation . . . Even if as claimed the employee had temporary direction over operations and sales in Vermont, it would still have been necessary in this case to establish nature of his authority to speak concerning corporate litigation."

The theory upon which an agent's statements are admissible is that the party is vicariously responsible for the acts of the agent within the scope of the agency authority. Thus, the statement must have been made in furtherance of the alleged agency or conspiracy.

What portions of the record do appellants rely on to prove the scope of Mr. Valenson's authority or his background or training to evaluate the lawsuit as a "million dollar lawsuit"? What is Mr. Muntain supposed to have lied about?

It is clear that Mr. Freeman may not testify to the conversation until Mr. Valenson's authority has been established.

Such cannot be established:

1. Mr. Freeman's own memoranda show Mr. Valenson not only was not acting on behalf of California Electric, but was a disgruntled ex-employee seeking revenge.

2. The principals of California Electric deny the authority.

3. There is no evidence that Mr. Valenson was authorized to make any statements concerning the subject matter.

4. None of Mr. Valenson's statements were made in the course of any authorized sales activity.

5. Appellants refused to call Mr. Valenson to the stand in spite of repeated invitations by the Court to do so.

6. Appellants didn't introduce Mr. Valenson's deposition.

7. Appellants avoided this subject matter when they took Mr. Valenson's deposition.

8. There is no foundation as to Mr. Valenson's qualification to assess the worth of a law suit, particularly in the "million dollar" class.

9. There was no attempt to show Mr. Valenson's knowledge of the testimony of Mr. Muntain.

10. There was no attempt, when Mr. Muntain was examined at the trial, to show what he had allegedly lied about.

(2) EXCLUSION OF A PORTION OF MR. RISING'S TESTIMONY.

Appellants next complain [Subsection A (2)] of the exclusion of "testimony" of Mr. Rising concerning "the general practice of manufacturers" with respect to advertising retail prices in order to get advertising credits.

This is another subversion of the truth. The transcript (and appellants' specifications of errors at p. viii) shows that the question to Mr. Rising was whether California Electric did not have a policy of refusing advertising credit unless the dealer advertised at the suggested list price *or* at no price at all. The witness starts to answer by saying:

> "General industry practice that the factory establishes the price, that they will allow the cooperative advertising to be—."

He was interrupted by prompt objection and the testimony was stricken.

From the foregoing it is quite obvious that:

1. This was an unresponsive answer to a specific question. The question was with regard to the *par-*

ticular distributor's policy, yet the answer starts (but never finishes) a discussion of *general industry* practices of factories.

2. California Electric is a distributor; it is not a factory. Thus, there is no showing of his qualifications, as an employee of a distributor, to testify as to general industry practices of manufacturers.

3. Appellants never pursued the subject with this witness either as to California Electric's policy or as to industry practice.

It is quite clear from the testimony quoted by appellants at pages iii to iv that the witness *never* stated what the general industry practice was, nor did he state enough even to indicate he had any knowledge of general industry practice. In fact, even as to his own company's policies, he knew only "in general". (T. 3813)

Appellants would torture this fragment of an answer into evidence that the general practice of manufacturers was to require that suggested retail prices be shown in retail advertising.

(3) EXCLUSION OF EXHIBITS.

The third and final reference to California Electric in this Specification deals with the exclusions of three groups of exhibits.

In the first group are listed Exhibits 68, 69 and 85. The appellants refer, in connection with these exhibits, to the transcript pages 3837-3841. Those pages of the transcript show only that the witness, Mr. Rising, testified that these particular exhibits were *not records kept by California Electric;* that Mr. Rising assured the Court and counsel that they were *not* this appellee's records and that this witness knew nothing about them. Counsel made no effort

then or thereafter to lay any kind of a foundation for the introduction of these exhibits. His sole "foundation" was that they were found in the files of California Electric and they had Broadway-Hale's name on them.

The refusal to accept Exhibit 1789 into evidence through the testimony of Mr. Rising is assigned as error. At transcript page 3716, line 22, the following appears (Mr. Rising on the stand):

> "The Court: Have you seen that letter before?
> "The Witness: No."

Counsel then continues with another try (T. 3716):

> "Mr. Keith: Shown to you in your deposition, wasn't it, Mr. Rising?
> "Mr. Dold: Wait a minute.
> "The Witness: I *don't recall* this letter.
> "Mr. Keith: Now, Mr. Burke was at that meeting, was he not?
> A. According to this, *I don't know where* the meeting took place *or anything else.*" (Emphasis added)

Complete ignorance of the document is no foundation whatsoever. Appellants are frivolous in asserting error here.

The transcript also shows with respect to this exhibit at page 3716, line 2 to line 10, the following:

> "Q. Well, let the records show, Mr. Rising, you were there. Did you or did you not ask for a $10,000 payment from Philco to cover Hale—
> A. My recollection is we did not.
> Q. You did not.
> A. We did not.
> Q. And this letter does not refresh your recollection that you did; is that correct?
> A. No, it does not."

The foregoing constitutes the sum total of counsels' efforts to lay a foundation for this document! It shows that the witness is completely ignorant of the document. It is incredible that appellants should urge that a foundation was laid for its introduction.

The last exhibit referred to in this specification of error is Exhibit 5021. It was rejected on the grounds of hearsay and irrelevancy on the motion of Broadway-Hale. The transcript at pages 3737 to 3738 shows that: Mr. Rising (a) did not attend the meeting referred to in Exhibit 5021; (b) did not recall that there was ever a meeting such as that referred to in Exhibit 5021; (c) and did not have any knowledge whatsoever whether California Electric paid the costs for a dinner with someone from Broadway-Hale.

The Court asked whether this witness had any recollection at all of the dinner meeting referred to in the exhibit, and the witness said he did not. Thereupon, counsel ceased his attempts to lay a foundation, if we can dignify the action by the word "attempt", and yet offered Exhibit 5021 which obviously had not been identified in any respect. Counsel made no further attempt to identify it.

Furthermore, even if California Electric had paid a bill for a dinner attended by someone from Broadway-Hale, what is the probative value of that fact absent any evidence or offer of proof as to who was there and why and what was said?

Specification V—Subsections B Through G: Exclusion of Evidence.

These specifications refer solely to other appellees and, therefore, are not commented upon here.

Specification V—Subsection H: Exclusion of Certain Portions of the Alpine Deposition.

The deposition of Arthur Alpine, the President of appellants, was taken by appellees. He was asked to produce his memoranda and notes of conversations with appellees and he refused to produce them. The completion of this deposition was expressly reserved "until matters reflected by the record, which precludes conclusion of the deposition, are clarified." (Dep. Alpine p. 687, lines 11-19) There are specific and express reservations of rights to continue the examination of Mr. Alpine when and at such time as he produced the pertinent documents (Dep. Alpine pp. 685, 687, 629).

Interrogatories to identify dates and other information regarding the Alpine memoranda were served (R. 299 a-c) and appellants secured an extension of time to answer (T. 6247). Mr. Alpine died on February 18, 1962 (T. 7022) before the interrogatories were answered and before the appellees could question him about the memoranda and notes and other subjects that might be developed thereby.

Thus, the deposition is unsigned by Mr. Alpine (no waiver of signature was made by anyone), never read or corrected by him and was not otherwise completed even as to scope of inquiry.

Appellants (Brief p. 155) admit that Mr. Alpine died "before completion of the deposition".

Appellants were offered the opportunity to read most of the fragmentary deposition into evidence. (T. 6181 to 6212), but appellants refused to do so. (T. 7277) Also, the excluded portions, as to *this* appellee, contain nothing adverse to California Electric and, for the most part, were repeated by Mr. Freeman in his deposition and at the trial.

Appellants, in Subdivision (d) of this specification of error, discuss the excluded portion of the Alpine deposition (pp. 279-280) so far as California Electric is concerned. The first is his testimony as to an alleged conversation with John Muntain of California Electric in which Mr. Muntain is reputed to have said that he was receiving pressure from his bosses who were receiving pressure from "their Mission Street accounts". Quite obviously whatever the "bosses" said is hearsay. Furthermore, just who are the "Mission Street accounts" is not indicated. They are not even identified as any of the alleged co-conspirators. Nor is there any suggestion of what the "pressure" was.

The simple answer to this innuendo is that California Electric elected to and did sell to Manfree and that it was Manfree who terminated the relationship because of a better deal with a competitor.

The second excluded portion of the Alpine deposition (Dep. 569-573) which related to California Electric was that after the form letter of June 24, 1960. Mr. Weaver of California Electric called on Alpine and asked him if he really wanted to purchase a carload of merchandise. Mr. Alpine says he replied affirmatively, and that Mr. Weaver replied that the company had a shortage of merchandise with the result that appellants, therefore, would not be able to get carload prices on it. This certainly suggests no wrong-doing whatsoever.

Apart from the question of relevancy or any other basis for objection, the Alpine testimony in these respects would have been cumulative because Mr. Freeman testified to the very conversation at which Mr. Alpine and Mr. Weaver were present. Mr. Weaver also testified to this conversation (Freeman's testimony at p. 5778; Weaver's testimony at pp. 3917-3921). The rejected Alpine testimony does not contradict their testimony.

The only other testimony related to California Electric is Mr. Alpine's conclusionary summation that Mr. Muntain turned down appellants' request for co-operative advertising funds. (Alpine Dep. p. 418) This testimony again would have been merely cumulative because it was repeated in more detail by Mr. Freeman, the then Vice President and later President of Manfree. (T. 5725)

Thus, the particular excluded portions of Alpine's deposition concerning California Electric, since they were either cumulative or inconclusive, would not have advanced appellants' cause and the exclusion did not hurt the presentation of their case. In any event, the deposition was never completed and, therefore, was inadmissible.

There are three bases for suppressing the incomplete deposition:

First, the purported deposition was not submitted to, nor signed by, the witness in accordance with the mandate of Rule 30(e);

Second, the deposition was never completed because of Alpine's unreasonable refusal to answer;

Third, the appellants made no effort to have the deposition completed or signed.

It is the duty of a plaintiff to get his case to trial. Defendant's sole duty is to meet the plaintiff step by step and he has no duty to initiate action to ready the case for trial. In *Vorheis v. Hawthorne-Michaels Co.,* 151 C.A.2d 688 at 694, 312 P.2d 51, (1954) although the defendants had the deposition in their possession for six months and failed to obtain the signature of the deponent, the Court nevertheless held that to be the burden of the plaintiff, not the defendant.

3 *Wigmore,* Evidence § 802 (3d ed. 1940) points out that the term "deposition" has an exclusive meaning: "Testimony which, in legal contemplation, does not exist apart

from a *writing* made *or adopted* by the witness". (Emphasis added) The author discusses the special necessity for guarding against inaccuracy due to the departure from the oral form and the reduction into writing. If the witness himself wrote the statement entirely, no special problem would arise; *however,* since it is an *intermediary* who makes the writing that is to become the testimony, therefore, says Wigmore, it becomes "*specially necessary* to make sure that this writing shall represent precisely the statement for which the witness stands responsible". Among the special rules which this distinguished author refers to is the "requirement of 'the witness' deliberate and knowing endorsement of the transcription as completed".

Wigmore, at § 805, makes it clear that the signature is a technical requirement, but nevertheless an *indispensable* one under the statutes. He points out that a deposition is the creature of the statute and because the testimony is exclusively to be found in a writing made by another, then, if it is not signed, the technical requirements are *not* fulfilled and the writing "*never becomes testimony, and there is no testimony of that witness*". (Emphasis added)

Rule 30(e) is identical with California Code of Civil Procedure 2019(e). Justice Peters of the California Supreme Court, in *Coy v. Superior Court,* 58 C.2d 210 at 218-219, 373 P.2d 457 (1962) had the following to say regarding depositions under this section:

> "A deposition is not final until read, signed and filed. Until that time it may be corrected or the answers changed."
>
> "Certainly an answer in a deposition remains undetermined, or uncertain, until such time as the document is signed."

Accord: People v. Hjelin, 224 C.A. 2d 649, 37 Cal. Rptr. 36 (1964); *Western Concrete Structures Co., Inc. v. James I.*

Barnes Constr. Co., 206 C.A. 2d 1, 23 Cal. Rptr. 506 (1962); *Bennett v. Superior Court,* 99 C.A. 2d 585, 222 P.2d 276 (1950); *Noah v. Black & White Cab Co.,* 138 C.A. 236, 32 P.2d 437 (1934); *Thomas v. Black,* 84 C. 221, 23 Pac. 1037 (1890).

The federal rule is interpreted in the same manner as the California Code section. *Smith v. Insurance Company of North America,* 30 F.R.D. 534, 536 (N.D. Tenn. 1962); *Continental Can Co. v. Crown Cork & Seal, Inc.,* 39 F.R.D. 354, 356 (E.D. Pa. 1965).

Appellants reliance on *Re-Trac Corporation v. J. W. Speaker Corporation,* 212 F. Supp. 164, 168 (E.D. Wis. 1962) is misguided. In that case the *plaintiff* took the deposition of defendant's president and at its close plaintiff's counsel indicated an intent to continue the deposition at a future date on matters relating to the subject matter only of defendant's counterclaim. The deponent died prior to resumption and it was plaintiff who objected to the admission of the testimony on the ground that it was incomplete and that he had taken the deposition for discovery, not for perpetuation of testimony. Furthermore, and equally important, the plaintiff had had *full* cross-examination and had not indicated any matter that he had not completely investigated as far as his case was concerned. The Court pointed out that the deposition was complete as to plaintiff's case.

The other authorities cited by appellants are similarly inapposite: In *Battelli v. Kagen & Gaines Co., Inc.,* 236 F.2d 167 (9th Cir. 1956), neither defendant nor his counsel attended the deposition and, therefore, since the defendants elected not to be represented at the deposition, they could not object to its admission; 4 *Moore Fed. Prac.* § 3202 deals only with effects of irregularity in depositions, not with the

subject of incomplete depositions or failure to sign. In *Inland Bonding Co. v. Mainland Nat. Bank of Pleasantville,* 3 F.R.D. 438 (D.C.N.J. 1944), plaintiff took the deposition and completed it; in our case, the defendants were taking the deposition and were denied the opportunity to complete it. In *Paul v. American Surety Company of New York,* 18 F.R.D. 68 (S.D. Tex. 1955), the defendant took and completed plaintiff's deposition but did not have plaintiff sign and allowed 17 months to elapse before presenting it for signature during which time the plaintiff died; here Alpine's deposition could not be completed because of appellant's refusal to produce the pertinent memoranda of the alleged conversations he had had with representatives of appellees.

Specification V—Subsection I: Excluded Evidence of Alleged Conspiracy to Control Market Entry in San Francisco.

There are twenty-one (21) subdivisions to this specification.

The first eight relate to other appellees and are, therefore, not applicable to California Electric.

The ninth through the sixteenth subdivisions are inapplicable to the appellee because they deal with meetings of associations where this appellee is not involved.

The seventeenth subdivision complains of the exclusion of certain studies prepared by appellants' witness which were self-serving hearsay and put forth without either foundation or relevancy. The eighteenth subdivision covers certain advertising credits allegedly allowed to Broadway-Hale by others than California Electric. The nineteenth refers to two other appellees. The twentieth complains of rejection of damage evidence which, obviously, is not material or relevant on the sole issue of liability.

The final subdivision of this specification asserts error in the rejection of a surprise offer of proof of the testimony of an unlisted witness, one Fractenberg, a former officer of Klors, and in the refusal to permit the introduction of the deposition of Mr. George Klors from another lawsuit many years before to which California Electric was not a party. Appellants reason for seeking to introduce this deposition and the testimony was to prove that there had been some sort of conspiracy with respect to Klors antedating this alleged conspiracy.

In *Dart Drug Co. v. Parke, Davis & Co.,* 221 F. Supp. 948, (D.C. 1963) the court summarily dismissed a treble damage suit born out of the government's litigation against Parke, Davis. The defendants subsequent decision to stop selling to the discounter who was the government's complaining witness, was held not to be a violation of Section 1. The new refusal to deal was not accompanied by any attempt to induce wholesalers or distributors not to sell to Dart. An argument that this second refusal of Parke, Davis to deal with Dart must be deemed to have been a product of the original combination between them and its wholesalers was rejected:

> "The mere fact that a person has violated the law on one occasion is no proof that some later action of his, which on its face is not a violation of law, must be tainted with the illegality of the prior act."

Appellants neglect to state that the *Klors* case was eventually tried before a jury and was lost by Klors. The final result was a directed verdict for defendant.

The inapplicability to California Electric of any of the offered testimony from the Klors gang, particularly from a case to which California Electric was was a party, is apparent and needs no further comment.

Specification VI (A)—Alleged Ruling That Appellees Were Not Bound "By the Adverse Testimony of Their Employees".

We emphasize the two words "testimony" and "employees" in the foregoing caption to highlight the misrepresentation. Under this specification, as to California Electric, appellants incorporate by reference the earlier specification V-A-1, thus trying to make two specifications of error out of one. The portion so incorporated by reference is Mr. Freeman's story of what Mr. Valenson had told him after Mr. Valenson had been discharged by California Electric.

Here is a striking illustration of the duplicity that permeates appellants' brief. Mr. Valenson at the time of the statements he is purported to have made to Mr. Freeman was (according to Mr. Freeman) an ex-employee and a disgruntled one at that. The proffered evidence is *not testimony* of Mr. Valenson at all, but is testimony of Mr. Freeman about a hearsay statement Mr. Valenson is supposed to have made while an ex-employee. Thus, there is no "testimony; there is no employee". The appellants know that.

Specification VI (B)—Alleged Ruling That "Managing Agents", Who Were No Longer So Employed, Are Not Adverse Witnesses Under Rule 43(b) So as to Be Impeachable.

In this section appellant, so far as California Electric is concerned, refers (Subsection c) to the testimony of Mr. Muntain. Here again is a shocking example of appellants' cavalier treatment of the record. We have underscored again the key words to make clear the sham. The record shows that Mr. Keith expressly stated he was *not* calling Muntain as an adverse witness. (T. 3933) At p. 3933, lines 16 to 22, the following appears:

> "The Court: All right, Mr. Keith, he is your witness. Mr. Keith, this is not 43(b).

Mr. Keith: Well, I am *not* calling him under 43(b) as an adverse and hostile witness.

The Court: You do?

Mr. Keith: I say *I am not, as a hostile and adverse witness.* I hope to qualify him."

On the same page of the transcript (3933) the witness states that he has no supervisory capacity over other personnel and that he was strictly a salesman. At page 3950 of the transcript it is shown, for instance, that Mr. Muntain had no authority to deal with co-operative advertising.

Obviously, he is not a "managing agent" as appellants would suggest in the caption, and Mr. Keith admits specifically that he was not "adverse".

Specification VI (C)—Ruling That Certain Witnesses Were Not Hostile and Adverse to Appellants.

None of the witnesses listed had any connection with California Electric nor did their testimony concern appellee.

Specification VII—Denying a Full Cross-Examination of Witnesses.

Under this subdivision, as to California Electric, the appellants list Mr. Rising and Mr. Muntain.

As to Mr. Rising: Appellants cite transcript pages 3865-3867. Those pages show that the witness testified that no dealer, distributor or manufacturer ever suggested or directed that California Electric not sell to appellants; that he never discussed that subject with any dealer, distributor, manufacturer or manufacturer's representative.

Appellants' counsel asked whether, during the period 1957-59, Mr. Rising didn't have a belief (calling for an inadmissible subjective guess) that Broadway-Hale was indicating its desire that suppliers not sell to the discount stores in San Francisco. Objection to the question was made

and overruled and the witness answered that he did *not* have *any* belief about Broadway-Hale on this subject.

Counsel then handed the Court Mr. Rising's deposition to read page 30, line 3. In that deposition, Mr. Keith asked Mr. Rising whether Broadway-Hale had indicated directly or indirectly that they would not appreciate it if California Electric sold appliances to U.S.E. or Manfree. The witness answered in the negative and volunteered his opinion that after the Klors suit if anybody at Broadway-Hale ever said or indicated anything like that, he would have been fired immediately. He said that they were gun shy. "You couldn't discuss it with them." The witness was then asked, "Mr. Sanford discussed with you, did he not, whom you were selling your line to?" Answer: "No."

As to Mr. Muntain: Appellants cite transcript pages 3939-3941. This is a repetition of Specification VI (B). Here again appellants are trying to get double mileage out of the same alleged error by repeating it as if it were new. As noted above in the reply to the earlier specification, Mr. Muntain was called as appellants' *own* witness, and Mr. Keith specifically stated that he was *not* calling him as an adverse witness. In the referenced portions of the transcript Mr. Keith had asked Mr. Muntain if he recalled any conversation with Mr. Freeman with respect to advertising policies of California Electric and the witness stated he did not. He then asked his own witness, "Don't you recall a conversation in 1957 in which you told Mr. Freeman that he would be unable to advertise?" Prompt objection was made to this, and the Court sustained the objection, and then Mr. Keith stated, "I am impeaching the witness." to which the Court replied:

"Impeaching? He is your witness, Mr. Keith. Sustained."

Specification VIII—Denial of Discovery of Certain Documents.

None of the requests for documents mentioned in this specification apply to this appellee.

Specification IX—Taxation of Costs Against Appellants.

The need of counsel for a daily record in a marathon proceeding such as this is obvious. Similarly obvious is the need for a copy of the deposition of officers of the parties. In this case, the transcript runs approximately 7,000 pages and was accumulated during a six-weeks trial which, in turn, was preceded by four years of discovery. During the discovery innumerable and lengthy depositions were taken.

The power to tax the costs of copies of selected depositions, of transcripts, and of exhibits and of other papers reasonably necessary for the orderly presentation of a case is inherent. *Independent Iron Works, Inc. v. U. S. Steel Corp.,* 322 F.2d 656, 676 and 678 (9th Cir. 1963). To the same effect and cited in that case is *Pearlman v. Feldman,* 116 F.Supp. 102 (D. Conn. 1953) and others therein cited.

The plaintiff who initiates an antitrust suit takes on a responsibility. If he wins, the law awards a general trebling of damages plus attorneys' fees. If he loses, it is only fair that he pay the reasonable costs incurred by the defendant as a necessary part of making an orderly presentation to the Court. It is as beneficial to the Court as to counsel.

ARGUMENT

Outline of Appellants' Position.

Stripped of its verbiage, appellants' 296 page opening brief (which includes a 63-page specification of errors) breaks down essentially into the following propositions:

(a) Boycott: in spite of the absence of direct evidence of any boycott, there were, say appellants, cir-

cumstances which should have been interpreted as creating inferences of conspiracy to boycott. They argue for an inference of conscious parallelism from the fact that some of the appellees never dealt with appellants and others did for awhile. As against California Electric, they argue strenuously that an inference of some kind was raised against this appellee from the fact that ex-employee Valenson, who volunteered to help appellants, was not called by this appellee before it moved from a direct verdict.

This appears to be the thrust of their argument as to boycott.

(b) Evidence purportedly was improperly excluded as to each appellee.

(c) Asserted denial of right to impeach witnesses as to each appellee.

(d) Claimed abuse of discretion in:

(1) Taxation of Costs.

(2) Bifurcation of Trial.

Outline of California Electric Argument.

California Electric synthesizes its arguments in answer to appellants' propositions under the following headings:

I. There Is No Direct Evidence of a Boycott by the "Conspirators."

II. California Electric Did Not Refuse to Deal With Appellant Manfree.

III. There Is Insufficient Evidence of Uniformity to Support Any Inference of Conspiracy Among the Appellees (Conscious Parallelism).

IV. There Is Insufficient Evidence to Support a Reasonable Inference That California Electric Accepted Any Alleged Invitation to Participate in a Plan to Boycott Manfree.

V. There Was No Uniform Policy by Apppellees Against Dealing With Discount Stores.

VI. There Was No Impeachment of California Electric Witnesses.

VII. There Was No Evidence Improperly Excluded as to California Electric.

VIII. There Is No Merit to Any Other Proposition Advanced by Appellants.

The Proof Required to Avoid a Directed Verdict.

At the outset, the proper standard for the granting of a motion for a directed verdict should be noted. It is well stated in *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 746 (N.D. Cal. 1959); *aff'd.*, 322 F. 2d 656 (9th Cir. 1963), *cert. denied,* 375 U.S. 922 (1963), wherein the District Court said:

> "Plaintiff is entitled to and must receive the benefit of all favorable inferences which can be drawn from the evidence. The plaintiff, however, still has the burden of establishing a prima facie case. He must rely upon reasonable and logical inferences from the evidence in the record. *Plaintiff cannot go to the jury on the basis of speculation, surmise or conjecture.*" (Emphasis supplied.)

So, where (as was the state of the evidence before the trial court in this case) "the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by . . . directed verdict. . . . By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." *Shafer v. Mountain Telephone & Telegraph Co.*, 335 F.2d 932, 934 (9th Cir. 1964).

There is no easy shortcut in determining the truth of a charge of conspiracy. Serious charges of wrongdoing must be *proved* by the plaintiff. The defendants do not have a duty to *disprove* such charges.

I. There Is No Direct Evidence of a Boycott by the "Conspirators."

With the benefit of every reasonable inference, the total evidence is merely that, for one reason or another, certain distributors of television sets and major household appliances (colloquially called "white goods") did not select, or did not continue to use, Manfree as a retail outlet for the sale of their products.

The record is wholly devoid of evidence of communications between any of the appellees, or between appellees and anyone else, on the subjects that appellants assert were part of the alleged conspiracy, namely, the question of boycotting Manfree, the alleged policy of not selling to discount houses and the alleged insistence on adherence to list prices. The record contains uncontradicted specific denials of any agreement or conspiracy by representatives of defendants and the alleged co-conspirators.

Appellants' "brief" is a stream of consciousness, repetitive and replete with the use of editorial comment or misstatement in the guise of factual summary. The record only—not the imaginings and fancies of appellants' counsel —is what the Court must look to.

A. THE DIRECT EVIDENCE NEGATES ANY BOYCOTT.

The record demonstrates how patently ridiculous it is to speak of proof of "conspiracy" in this case. Appellants' theory reads as if it were lifted from an early Mack Sennett scenario of the "Keystone Cops" or was borrowed from a Gilbert and Sullivan libretto.

Start with the fact of the variation in the product lines of the several appellees: washers, refrigerators and televisions, and then add—newspaper publishers!

The independence of the judgments of the distributor appellees is manifest: two sold to plaintiff but at different times, California Electric from May 1957 to September 1958 and Maytag from January 1958 to March 1959. "Co-conspirator" Lancaster stopped selling to Manfree in 1957 before these two started to sell to Manfree. Frigidaire and General Electric never sold to Manfree.

Does this sound like agreement to boycott?

When Maytag canceled the Manfree franchise, that company similarly and at the same time canceled twenty to thirty other dealer franchises, including Lachman Bros. and Sterling Furniture, two of the alleged conspirators! (T. 3332-3333) Some conspiracy!

Three manufacturers (Borg-Warner, Whirlpool and R.C.A.) never sold directly to *any* retailer in Northern California, whether "co-conspirators" or not (T. 1926).

Redlick's, one of the asserted "co-conspirators," purchased nothing from "conspirator" Maytag in the years 1960, 1961 and 1962 (Pl. Ex. 641).

"Conspirator" Philco cut off "conspirator" Broadway-Hale from co-op advertising funds. Clearly Broadway-Hale did not influence Philco advertising policy (T. 3735).

Maytag stopped selling Manfree in March of 1959 and sold nothing to "co-conspirator" Macy in 1960 (Pl. Ex. 6494 and 6441).

Frigidaire, in 1959, canceled "co-conspirator" Broadway-Hale for lack of performance and never dealt with them thereafter, and the same year they did the same to "co-conspirator" Macy! The next year they canceled Lackman

Bros. refranchising that company in 1960. Sterling closed its San Francisco outlet in 1961, leaving Redlick's as the only Frigidaire distributor in San Francisco during the period 1957 to 1963. The fact that Frigidaire was not taking on Manfree creates, therefore, no inference of conspiracy.

There was never a joint meeting of representatives of Broadway-Hale, Philco and California Electric. There was never a meeting between California Electric and representatives of Broadway-Hale in which the question of the distribution of Philco products was discussed (T. 3698-3699).

Not even Mack Sennett or Gilbert would have concocted, for serious public acceptance, an idea of such an odd group of conspirators: newspapers, manufacturers of television sets, manufacturers of kitchen equipment, manufacturers of laundry equipment, distributors of various household items, a few retailers to whom many of the "co-conspirators" would not even sell and some that were terminated for cause, "conspirators" who sold to appellants and some who didn't, "conspirators" who sell to retailers and those who don't. It all adds up to a most unique and wholly imaginary "conspiracy."

For this reason appellants' massive legal quaquaversal on the issue of conspiracy is really reduced to reliance upon the suggested inferences which we have culled from the tome and will discuss after a brief comment on the alleged conspiracy with the newspapers.

B. THERE WAS NO CONSPIRACY WITH THE NEWSPAPERS.

The charge that one or more retailers control the newspapers is ludicrous.

Until 1961, when it ceased being a "closed door" store, U.S.E. was able to place only one advertisement in the

San Francisco Chronicle or the San Francisco Examiner (T. 2089-2090).

The reason was that the Chronicle had a policy against accepting advertising from stores which charged a membership fee (T. 2104-2105). The Examiner also had a policy against accepting advertising from "membership" stores (T. 2094).

This direct evidence is uncontradicted and comes from appellants' own witness, Joseph Mittelman. It is established that both the Examiner and Chronicle accepted appellants' advertising as soon as they opened their doors to the public (T. 2156-2159). Moreover, the Call-Bulletin, and its successor, The News Call-Bulletin, accepted U.S.E. advertising from the day it opened its doors. (T. 2668)

This assertion of dominance of the newspapers by one or more retailers is some of appellants' counsel's dream stuff.

II. California Electric Did Not Refuse to Deal with Appellant Manfree.

Common to all of appellants' arguments is the premise that each appellee refused to deal with Manfree. Reference is made throughout appellants' brief to the "admitted refusals to deal" and the "joint and common refusals to deal". The fact is, however, that not only does the record fail to disclose an agreement not to deal and fail to show concert of action from which such an agreement might reasonably and logically be inferred, but the record does not contain a showing that all appellees *refused to deal* with Manfree. As to appellee California Electric, the record clearly demonstrates its actual sales to Manfree and its willingness and positive efforts to continue to sell to Manfree.

California Electric sold Manfree from the time it opened its doors as the successor of its defunct predecessor in U.S.E. While a substantial initial order had been obtained from Manfree, its subsequent orders were minimal (one or two pieces on an average of every two weeks) except for one half-carload order in response to a special offer of California Electric providing unusual inducements for such an order. When Manfree's merchandise orders became so small that California Electric questioned whether further relations were worth the effort, the regular salesman and the salesmanager of California Electric visited Manfree to solicit additional sales. They were not allowed on the Manfree premises. Instead, after waiting outside, they were informed by Mr. Williamson, the manager, that Manfree was not interested in the Philco line carried by California Electric because they had found a better supplier with a better product and at lower prices. (T. 3693, 3970). Manfree's last sales order was delivered in September 1958. Despite this rebuff by Manfree's officials, California Electric's salesman, on several occasions after the September sale, made further efforts, without success, to sell this appellee's products to Manfree.

Almost two years later, in late June 1960, with this background, California Electric was added to Manfree's mailing list and received a letter with a request for carload prices and a franchise for the Philco product line. *Despite* Manfree's performance history, California Electric actively responded to the letter by sending its Mr. Weaver to call on Manfree officers at the USE premises. He told them that carload orders could not be filled at that time by Philco, California Electric's supplier, because of a steel strike which prevented California Electric from getting enough merchandise to cover existing dealers. He sug-

gested that Philco's delivery problems should be straightened out soon and extended an offer to discuss sales at California Electric's upcoming sales show, invited them to attend, and told them he would see them at the show. (T. 3694-3699, 3915-3921) Manfree chose not to attend or otherwise to accept the offer to discuss purchases from California Electric. (T. 3694) Instead, within weeks of Mr. Weaver's solicitation, appellants filed their extensive complaint against twenty-six defendants. Appellants would have us believe that the demand letter (Ex. 1783) was a genuine attempt to obtain merchandise rather than an attempt to manufacture evidence for an already contrived and prepared lawsuit.

The first portion of the opinion in *Standard Oil Co. of California v. Moore,* 251 F.2d 188 (9th Cir. 1957), establishes that no refusal to deal can be inferred from the mere receipt of such a demand letter. This Court there made it clear that the plaintiff who circulates such a letter and asserts a refusal to deal has the obligation of proving further, by substantial evidence, that the demand letter was in fact a bona fide offer to buy, *and* that there has been a rejection of the offer or a failure to accept the offer unaccompanied by any circumstances justifying the failure to accept. (251 F.2d at 203) The point of inquiry here is *not,* as appellants urge in their brief, whether California Electric, and the other appellees, had a valid defense for their "refusals to deal"; instead is whether there was in fact a *refusal* to initiate or once again undertake sales to Manfree. The *Moore* opinion examines in detail the evidence of the events following the receipt of a bona fide offer to purchase because if either General or Union did all that was reasonably required of them in response to the letter, there then was *no* refusal to deal. Merely to prove that following

the receipt of a "shotgun" demand letter for carload prices of merchandise no purchases were consummated does not carry the day for appellant Manfree. This is the line of false reasoning which the philosophers describe as *"post hoc, ergo propter hoc"*—after the fact, therefore on account of the fact. It is clear from the evidence, and no contrary finding could reasonably be made, that California Electric's response to Manfree's demand letter was all that could reasonably have been required of it and that by no stretch of a jury's imagination did California Electric refuse to deal with Manfree. In addition, whereas the plaintiff's letter in the *Moore* case contained an express offer to purchase, Manfree's letter to California Electric carefully avoids making an offer to purchase. If the letter *had* contained an offer to purchase, it seems clear from the size of Manfree's prior purchases that no offer to purchase in carload lots would have been bona fide, but only an attempt to create *Moore* case type of evidence for use in litigation.

It is important, this appellee suggests, for the courts firmly to strike down the proposition that, as a result of a broadside letter stating "interest" in buying merchandise in carload lots, the law requires that either sales of the merchandise involved be promptly consummated or each recipient of the letter will be faced with a charge that he has "refused to deal" with the sender. The policy of encouraging private enforcement of the antitrust laws does not include encouraging businessmen to supplement their income by engaging in the business of developing antitrust litigation. The policy of the law should be to refuse to give weight to contrived "demand letters" mailed to prospective defendants on the eve of the the filing of an antitrust complaint long in the process of preparation.

Appellants treat this response of California Electric's to Manfree's demand letter (Br. p. 103) as a "categorical"

refusal to sell to Manfree. Appellants there refer us to Mr. Freeman's conclusion that, after Mr. Weaver's visit in response to the demand letter, Manfree was never thereafter "able" to purchase from this appellee. It is noteworthy that Mr. Freeman neglects to mention and fails to deny that he had been invited by Mr. Weaver to discuss purchases, but had declined to participate further in any such discussions.

Appellants also urge (Br. p. 103) that, because California Electric failed to call its former employee, Mr. Valenson, to the stand before making its motion for directed verdict, some inference arises that the testimony would be adverse to California Electric on the question of whether there was a refusal to deal. This is most strange. The obvious and complete answer is that a motion for a directed verdict regularly is made before the defendant puts on his case.

The principle suggested by this argument actually militates against appellants. First, consider the inferences that are raised against the appellants for their refusal to call Mr. Williamson, general manager of Manfree, who, appellants assert, was present at many of the conversations testified to by Freeman, who could have verified the Freeman testimony, and who, according to California Electric witnesses, flatly told California Electric representatives that he was no longer interested in buying Philco because appellants had a better deal with a competitive line; secondly, the inference urged by appellants also arises against appellants from their failure and refusal to call Mr. Valenson or to read his deposition during their attempt to present a prima facie case of conspiracy, despite the repeated suggestions of the Court to do one or the other. As shown above in our comments on the specifications of error, Mr. Freeman described Mr. Valenson as a hostile disgrun-

tled ex-employee of California Electric, who sought to defect to appellants and who had volunteered to help appellants, even to return to work as a spy against California Electric. Appellants rejected invitations to produce this man.

The case appellants rely on here is *Interstate Circuit Inc. v. United States,* 306 U.S. 208, 83 L. Ed. 610 (1939), a theater distributor case where the Supreme Court upheld an inference of agreement because, among other things, the defendant distributors had

> ". . . failed to tender the *testimony, at their command,* of . . . any officer or agent . . . who knew . . . whether in fact an agreement had been reached among them for concerted action." (Emphasis added.)

Based on Freeman's statements, the Valenson testimony was available at *appellants'* command! Definitely it was *not* at the command of his ex-employer, California Electric. This appellee did produce all of its knowledgeable personnel as witnesses (Rising, Muntain, Weaver, McDonnell).

III. There Is Insufficient Evidence of Uniformity to Support Any Inference of Conspiracy Among the Appellees (Conscious Parallelism).

It has been said that the cryptic words "conscious parallelism," which have found their way into antitrust terminology, have no esoteric exegesis. When properly used, they constitute merely a picturesque reference to a particular kind of evidence and, as such, do not present a unique problem. The term is never meaningful by itself but only assumes whatever significance it might have from additional facts. (75 Harv. L. Rev. 655 at 658 (1962) Turner) The evidence must still be analyzed to determine whether it fairly gives rise to a reasonable and logical inference of conspiracy. If it does not, the law does not let the plaintiff's case go to the jury.

A decade and a half ago, the Supreme Court made it clear that consciously parallel conduct alone is not equated with conspiracy. In *Theatre Enterprise, Inc. v. Paramount Film Dist. Corp.,* 346 U.S. 537, 540 (1953), the Court held that "conscious parallelism" has not yet read conspiracy out of the Sherman Act. The Attorney General's National Committee to Study the Antitrust Laws declared itself "in full accord" with the reasoning in that case.

Since that often cited decision, it has been made abundantly clear that mere consciously parallel conduct is not tantamount to conspiracy, and that the antitrust laws do not prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or similar policies. Illustrative of many cases is *Independent Iron Works v. U.S. Steel Corp.,* 177 F. Supp. 743 (N.D. Cal. 1959), *aff'd.* 322 F.2d 656, 661 (9th Cir. 1963), *cert. denied* 375 U.S. 922 (1963), upholding a directed verdict for defendant, and holding that any sameness of conduct must *logically* suggest joint agreement, as distinguished from individual action:

> ". . . there must be a sameness of conduct under circumstances which *logically* suggest joint agreement, as distinguished from individual action . . . The antitrust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy." (District Court p. 746-747.)

The Ninth Circuit, in giving its blessing to the directed verdict, said (p. 661):

> "The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner does not support an inference of conspiracy, even though each knew that the business behavior of another or the others was similar to its own. * * *"

Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F.2d 199 (3d Cir. 1961), *cert. denied,* 369 U.S. 839 (1962), affirmed a motion for directed verdict in favor of the defendant. In that treble-damage action, as here, the plaintiff offered no direct evidence of conspiracy. It alleged a conspiracy among the major tobacco companies and a Philadelphia ship chandler to refuse to do business with a new company setting up a chandlery operation. The "conscious parallelism," apparent in all three tobacco companies' refusal to deal with the new company, was described as weak by the Third Circuit, because the situation was not a sort which allowed much scope of action to the participants. In that case, as here, there are only two possible answers to the spanking new entity's request for supplies: "yes" and "no." The answers, therefore, can be pretty uniform without conspiratorial significance. (Manfree, of course, was a new and untried entity and a successor to a concessionaire which had failed (T. 5708-5712)).

The Court added (pp. 207-208):

> "In so deciding, we are not unmindful that the defendants' refusal to deal is as effective in foreclosing the plaintiff from the sea stores tobacco business as an agreement to do so would be. It has been argued that such uniform decisions, made under economic circumstances tending to make the act of one firm or company dependent upon the reaction of others, violate Section 1 even though conspiracy is absent. With this we cannot agree. Section 1 specifies means as well as ends. Perhaps as a matter of public policy restraint of trade *per se* should be controlled but conspiracy is required in this case."

Plaintiffs' reliance on *Esco Corp. v. U.S.,* 340 F.2d 1000 (9th Cir. 1965), is misplaced. The evidence of agreement was obvious there. A competitor (who pleaded *nolo* to a

criminal charge) had called a meeting to announce its pricing plans, and thereafter all those who had attended that meeting followed exactly the pricing plans as discussed. The Ninth Circuit pointed out that there was no other purpose for the meeting but to fix the prices by concert of action. No meeting of the defendants occurred in our case.

Girardi v. Gates Rubber Company Sales Division Inc., 325 F.2d 196 (9th Cir. 1963) relied upon by appellants is far from the point. In that case there was evidence of complaints by the distributor to the manufacturer concerning the plaintiff distributor. This is one of the "plus" factors that distinguish it from the case at bar.

Standard Oil Co. of California v. Moore, 251 F.2d 188 (9th Cir. 1957) is cited as factually the same as the case at bar. Appellants strain mightily. Their quotation from that case (Brief p. 95) contains the essence of the basic proposition of appellants:

> "Consciously parallel business behavior . . . is, however, admissible circumstantial evidence of an underlying agreement, combination or conspiracy."

Appellants argue that, assuming uniform refusals to deal with a retailer on the part of potential suppliers, and given additional evidence, such as was present in the *Moore* case, of *knowingly* uniform and concerted action, a jury could infer that the uniform refusals to deal were part of a larger scheme to effect a boycott. But the applicability of such an argument requires a showing not only of the uniformity of action, but also that the action was taken knowing it to be uniform to the business behavior of others.

In the present case, neither cooperation nor uniformity of action among Manfree's potential suppliers is in evidence.

In the *Moore* case there was ample evidence of "programs" among the suppliers to eliminate streetside price signs, evidence that a telephone call by one supplier would produce immediate similar action by another supplier, and evidence of threats that one supplier would create a united front among all distributors against an uncooperative dealer. But in this case there is no evidence that California Electric cooperated in even a single instance with another supplier, nor is there evidence from which it could be inferred that it communicated with other suppliers or had knowledge of the business behavior of any appellee. The additional evidence looked to in *Moore* was significant only in that it tended to show that the established refusals to deal (the particular practices which were claimed to have damaged the plaintiff) were the result of an agreement or understanding among the defendants.

Appellants claim that the record before this Court contains similar "additional evidence" demonstrating that California Electric's conduct of its business was knowingly parallel to that of the other alleged conspirators. First, it is claimed that California Electric promulgated suggested price lists and refused to allow advertising fund credits to retailers unless their advertising was done at list prices. In fact, however, California Electric did not supply price lists at all to the alleged instigator of this imaginary conspiracy, Broadway-Hale (T. 3684), and, in fact, sold to appellant Manfree who elected to receive a discount off invoices to it in lieu of an advertising allowance. (T. 3971-3972)

Secondly, appellants assert that other "price-cutters" were cut off by the defendant distributors, and refer us to page 71 of their brief to substantiate the charge. But, in fact, there is no showing there, or elsewhere in the record, that California Electric cut off any retailers.

Thirdly, appellants assert that there was evidence of communications between California Electric and other appellees concerning marketing and pricing practices. As the only support for this charge, appellants advise the court that other distributors were invited to California Electric's trade shows (as were officers of appellant Manfree itself); that an officer of Lancaster deemed his company to be a "friendly competitor" of California Electric, inferring, we suppose, that "co-conspirator" was an "unfriendly competitor" of the other appellees. There is no suggestion that being a "friendly competitor" involved the exchange of information of any sort whatsoever. Appellants also assert that California Electric allowed special price lists, or special product models, or special advertising funds to Broadway-Hale, but appellants can refer to nothing in the record involving either price lists or special product models from California Electric to Broadway-Hale, and they rest only on the 1957 transfer to Broadway-Hale of advertising funds erroneously credited by Philco to California Electric (T. 3736).

Thus, there is no "additional evidence" similar to that of the *Moore* case tending to establish California Electric as a party to any agreement to refuse to deal with Manfree.

A. THERE IS NOTHING TO JUSTIFY ANY INFERENCE OF A CONSPIRACY TO BOYCOTT APPELLANTS FOR THE PURPOSE OF MAINTAINING RETAIL PRICES THROUGH ANY REQUIREMENT OF USING SUGGESTED PRICES IN COOPERATIVE ADVERTISING.

The trial court in its opinion pointed out that the evidence disclosed that during some of the periods of time involved in the alleged conspiracy some manufacturers, not all, did furnish to their distributors suggested prices, but that it was clear that these were given as mere guide lines and were not mandatory. The Court also pointed out that the evidence disclosed that the retailers did not uniformly advertise price

or sell their goods at a distributor's suggested retail price. Exhibits 13043 et seq. show the numerous instances, for example, where Broadway-Hale advertised products at prices substantially lower than the retail prices suggested by the distributor. Broadway-Hale both priced and sold television sets and white goods at prices below suggested retail (T. 647-649). The practices followed by appellees varied substantially from time to time and from appellee to appellee. (Cf. T. 5066 with T. 3985-3986); it varied from retailer to retailer (T. 4086) and from one line of merchandise to another (T. 1892-1893, 1980).

The record abundantly demonstrates that retailers in San Francisco frequently have sold at prices other than the suggested retail prices (e.g., T. 5646, 5648-5649).

The manager of Manfree testified that Broadway-Hale was one of the biggest discounters in San Francisco (T. 5646).

Appellants single out Broadway-Hale as the leader of the alleged conspiracy. In some cases, receipt of co-op advertising money was conditioned upon use of either suggested retail prices or no-price in advertising (T. 603, 794-796). Other distributors, such as Frigidaire (T. 751) and General Electric (T. 1431-1433) imposed no such requirement. Broadway-Hale frequently advertised at prices below suggested retail (see Ex. 13045) and both priced and sold television sets and white goods at prices below suggested retail (T. 647-649). Maytag gave advertising allowances for below-list advertising (T. 3383-3384) and so did Frigidaire (T. 1314; 1967; 4087).

Thus, these "conspirators" all had quite different and individual policies, as many policies as there were dealers.

California Electric at one time conditioned its payment of co-op advertising on the use of suggested list prices or

no prices (T. 3859 and 3565) which was a unilateral decision it had a right to make. This would not prevent dealing with Manfree whose manager testified it frequently advertised without showing a price (T. 5647).

Mr. Muntain testified that he recalls but one situation where Manfree asked California Electric for cooperative advertising funds (T. 3953 and 3957) and the request was granted (T. 3949-3951). The record is without evidence that Manfree did in fact ever use price advertising or ever advertised discount prices for named television sets or appliances.

There is not a speck of evidence that California Electric required any retailer to sell at any specified price. Appellants rely on innuendoes based on a request, limited to cooperative advertising, that either the suggested list price be shown or no price be shown. This gives no basis for any inference that the retailer couldn't *sell* at any price he desired. There is no obligation imposed on any retailer to advertise; thus any advertising program could not be part of any boycott.

There is no suggestion at all that California Electric discussed its prices with any other distributor or manufacturer nor with any retailer in respect to the sale prices of any other retailer.

The essence of the complaint here is boycott but appellants failed to prove any of the ingredients of boycott. It is appellants' fiction that there was some sort of price fixing that prompted the boycott. Under the Sherman Act (which is the only act involved in this lawsuit) "price fixing" means a conspiracy to raise, depress, hold or otherwise fix the price of a commodity in interstate commerce. The test is whether such agreements interfere with the freedom of the retailer and thereby restrain his ability to sell in accordance with his judgment. There is an abysmal failure of appel-

lants to present any facts that meet this test.

Klein v. American Luggage Works, Inc., 323 F.2d 787, 791 (3rd Cir. 1963) was a price fixing case in which the defendant manufacturer required retailers to maintain retail prices suggested in catalogues and pre-ticketed on the luggage. The Third Circuit held there was no infraction of the law in advising retailers of the manufacturer's policy (and its expectation) that customers would not resell below pre-ticketed prices. In our case there was no policy as strong and definite as that of the American Luggage Co. Appellants are really saying that even if a particular appellee believed discount advertising detrimental to the good name of his product, he nevertheless had a duty to finance the advertising of the product at a cut price or in some manner which the appellee, in its unilateral judgment, believes to be poor business practice. That proposition is patently ridiculous. Cf. *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.,* 346 U.S. 537 (1954); *Taubman v. Cottage Woodcraft Shops,* 194 F.Supp. 83 (S.D. Cal. 1961); *U.S. v. Colgate,* 250 U.S. 300 (1919).

Appellants cite *Plymouth Dealers' Association of Northern California v. U. S.,* 279 F.2d 128 (9th Cir. 1960), but in that case competitor members of trade associations *jointly* formulated and issued "suggested list prices" which, while not uniformly adhered to by all, were at least agreed upon "starting points" designed to stabilize ultimate prices charged. The Ninth Circuit, in that case, found that competitors met, agreed upon content, printed and circularized the "list prices":

> "It was an agreed starting point; it had been agreed upon between competitors; it was in some instances in the record respected and followed; it had to do with, and had its effect upon, price . . . (it was) a plan entered into by competitors to control prices . . ." (279 F.2d 132 at 133)

There is a total absence of any proof of agreement or combination among appellees with regard to any requirement of a minimum or no-price cooperative advertising policy. There has been absolutely no interference with the freedom of choice of the retailers in connection with any advertising policy. Any of the appellees, adopting a cooperative advertising program, did so as a matter of their own free choice. There is no suggestion of any agreement between manufacturers, or between manufacturers and distributors or retailers with respect to competitors' programs.

There is *no* suggestion in the record that California Electric talked to, consulted with or was influenced by *anyone* in its policies or acts.

IV. There Is Insufficient Evidence to Support a Reasonable Inference That California Electric Accepted Any Alleged Invitation to Participate in a Plan to Boycott Manfree.

Interstate Circuit, Inc. v. U.S., 306 U.S. 208 (1939) cited many times by appellants, is advanced to support an inference of agreement or, as phrased by appellants (Brief p. 95), an acceptance "of an invitation to participate in a plan." A glance at the *Interstate Circuit, Inc.* decision shows how far it is from the mark at which appellants shoot. In that case the common course of action followed was an absolute requirement of price conformity which left no question as to intent to fix prices. No exhibitor could escape the defendants' requirements and still obtain their films. Moreover, there was identity of response in every essential detail of the various conditions ultimately imposed by the defendants. And, most importantly, each of the distributors "knew that cooperation was essential to the successful operation of the plan." In our case there was no plan; there was no cooperation.

On the facts in *Interstate Circuit, Inc.* the adoption of the plan by each distributor could be explained in terms of his own self-interest *only* if he had reason to believe that all of his competitors would join in. Thus, the Court explained:

> "It takes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity *such far-reaching changes in their business methods* without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance. . . . While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. *Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan.* They knew that the plan, if carried out, would result in a restraint of commerce, which . . . was unreasonable within the meaning of the Sherman Act. . . ." (306 U.S. 223, 226-227.) (Emphasis added)

Emphasis is added above to show how inapposite is that case to the one at bar. No appellee here made any changes in its business methods; no one was advised of what the others were doing; no one cared what the others were doing. Knowledge of the other persons' relations with Manfree was certainly not essential to the successful operation of anyone. We have elsewhere above expressly set out how different were the acts and policies of the appellees.

If it be inferred somehow that each knew what the others

were doing and in some instances "nearly contemporaneously did the same thing," this does not, without more, make out an unlawful conspiracy, *Interborough News Co. v. Curtis Publishing Co.,* 127 F.Supp. 286, 301 (S.D.N.Y. 1954) *aff'd.,* 225 F.2d 289 (2d Cir. 1955). See also *Independent Iron Works, Inc. v. U.S. Steel Corp., supra.*

The law is clear that there is no such thing as an unwitting conspirator. *U.S. v. Standard Oil,* 316 F.2d 884 (1963).

V. There Was No Uniform Policy by Appellees Against Dealing with Discount Stores.

Herbert Spencer's definition of a tragedy was to destroy a syllogism with a fact.

Appellants argue for inferences from alleged common anti-discount store attitudes. The facts are that California Electric not only had no such policy, but it did in fact sell to *this* discount store, *even* when it was a "closed door" shop.

Not only is there no evidence of a plot against discount stores, there is positive evidence to the contrary. For example, some of the "conspirators" dealt with GET, a discount store in San Francisco: Westinghouse (T. 6169); Lancaster (T. 2895); Hotpoint (T. 6073-6074 and 3185-3186). Another discount store in the Bay Area, White Front, carried the General Electric, R.C.A., Whirlpool, Philco and Norge lines of appliances and television sets (T. 4376-4382).

As a coup de grace to this argument we refer the Court to Mr. Freeman's testimony that Broadway-Hale was one of the biggest "discounters" in San Francisco (T. 5646).

VI. There Was No Impeachment of California Electric Witnesses.

Appellants argue that where an adverse witness is impeached on any point in his testimony, the trier of fact is

entitled to disbelieve his entire testimony. Therefore, say appellants, it was error not to send the case to the jury where a witness, who testified that there was no agreement in restraint of trade, was impeached on *any* point.

Wigmore, Evidence, 3d Edition, Section 1040, page 725, in discussing what amounts to a self-contradiction for purposes of impeachment, says:

> "In the present mode of impeachment, there must of course be a real *inconsistency* between the two assertions of the witness. The purpose is to induce the tribunal to discard the one statement because the witness has also made another statement which cannot at the same time be true (*ante,* § 1017)."

As to California Electric, on this point, appellants say (Brief, pp. 121, 122) they impeached Mr. McDonnell and Mr. Muntain. (It's a little difficult to translate just what appellants do say of Muntain—they say he was impeached and then say the Court refused to permit his impeachment (Brief, p. 122).)

A. MR. McDONNELL'S TESTIMONY.

Mr. McDonnell, an officer of California Electric, was called as an adverse witness by appellants.

> "Q. Now, those suggested list prices (on Philco-Bendix price sheets, plaintiff's Ex. No. 1931) are based on factory price sheets, are they not?
> A. *I couldn't tell you that.*" (T. 3632)

Counsel then sought to impeach the witness by reading this excerpt from his deposition:

> "Q. Do you in turn (after reviewing factory price sheets) make price sheets of your own?
> A. Not that I recall.
> Q. You use the factory price sheets?
> A. *I think we do, yes.*" (T. 3634)

The two statements are not contradictory. Quite obviously this is not impeachment (Wigmore, *supra*). The witness was uncertain on each occasion.

An attempt to lump this with *Girardi v. Gates Rubber Company Sales Division, Inc.*, 325 F.2d 196, 203 (1963) is made by appellants. In *Girardi,* the witness testified to lack of recollection of a conversation with certain persons on a given date. A memorandum written by the witness on the day following the conversation was admitted into evidence and impeached the testimony of the witness on a crucial fact in the case.

The Court said in *Girardi,* as to *that* witness on *that* testimony, the jury could well have disbelieved the testimony and believed the memorandum. The import of the court's decision is *not* that impeachment on any point meant that the case must go to the jury. The import is: that *this* point was so crucial to the ultimate issue of fact, the clear and real conflict on this point should have been resolved by the jury.

B. MR. MUNTAIN'S TESTIMONY.

The "impeachment" was of Mr. Muntain's testimony regarding inviting appellants to a California Electric trade show in January 1960. At the trial, Mr. Muntain testified, "I don't remember, sir, I may have." (Tr. 3632). At his earlier deposition, Mr. Muntain testified, "I don't believe we did." (Tr. 3966)

Analyzing the two answers, it is apparent that the prior statement is not an inconsistent statement and is not an impeaching statement.

We heretofore in this brief (p. 33-34) showed that Muntain was *not* called as an adverse witness and that he was not an officer, director or managing agent of California Electric.

VII. There Was No Evidence Improperly Excluded as to California Electric.

As to California Electric, appellants assert as error on this point: (1) the rejection of Bernard Freeman's testimony of what Mr. Valenson, an ex-employee, said in a hearsay statement, (2) the rejection of Mr. Rising's testimony which appellants falsely state described general industry practice.

We have already covered both of these matters in our comments on the Specification of Errors number V.

VIII. There Is No Merit to Any Other Proposition Advanced by Appellants.

The other points raised by appellants are:

(a) The alleged "impeachment" of certain witnesses which we answered in the discussion of Specification V and VII;

(b) The alleged abuse of discretion in taxation of costs, answered in our comments to Specification IX; and

(c) Alleged abuse of discretion in ordering a separate trial on the issue of liability before the issue of damages was to be tried. This we answered in comments to Specification II above.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should affirm the judgment in favor of California Electric.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VINCENT CULLINAN,

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